Aung Thun & Anor v Public Prosecutor and another appeal

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS B-05–150 OF 2010 AND B-05–151 OF 2010
AZAHAR MOHAMED, ROHANA YUSUF AND HAMID SULTAN JJCA
4 OCTOBER 2013

Criminal Law — Penal Code — Murder — s 34 — Deceased stabbed by accused persons — Whether there was common intention between accused persons — Whether prosecution showed nexus between accused persons and third person at large and acted in concert

Criminal Procedure — Appeal — Delaying in preparing and providing grounds of judgment — Accused persons charged for murder — Grounds of judgment only given 21 months after verdict was pronounced — Whether conviction on complaint raised by accused persons safe — Whether accused persons prejudiced by delay in delivering judgment — Penal Code s 34

The appellants, Myanmar nationals, were charged under s 34 of the Penal Code ('Code') for the offence of murder. On the fatal day, a quarrel had ensued between the deceased and the first appellant. This led to assault and the second appellant joined in the fray. There were a number of eyewitnesses to the incident and their evidence confirmed that the deceased was stabbed by the appellants. The appellants were then seen fleeing the scene as the deceased died. The murder was committed in 2003 and the appellants were arrested and charged in 2005 and the trial concluded in 2010. The verdict was pronounced in 2010 but the grounds were only given after 21 months. In the present appeals, the primary issue that arose was whether it was safe to convict on the complaint raised by the appellants. The first appellant submitted that the delay of delivering the grounds of judgment had prejudice to him and further argued that s 34 of the Code in relation to common intention would not be in place as the prosecution had not shown the nexus between the appellants and the third person who was at large and indeed had acted in concert.

Held, dismissing the appeals:

(1) Delay in criminal proceeding inclusive of hearing, decision as well as writing the grounds of judgment at times might be fatal. It would all depend on the facts and the circumstances of the case to entitle an appellant to get his conviction squashed in reliance of arts 5 and 8 of the Federal Constitution. There was no dispute that the verdict was given

promptly, though there was delay in supplying the grounds. Although the judge was constitutionally obliged to give her grounds without delay and it was not an act which could be condoned by any civil society but on the facts of the case, it was a clear case of cold-blooded murder committed at a public place with sufficient eyewitnesses and did not need any form of appellate intervention on this issue as the judge had written a speaking judgment consistent with the notes of proceedings (see para 9).

(2) To invoke s 34 of the Code, it would not be a *sine qua non* for the prosecution to prove pre-concert or pre-planning in the true sense. It would be sufficient if the prosecution could establish that the appellants were in the place and took part in the crime and/or had nexus to the crime. Section 34 is not a substantive law but procedural in nature, favoring the prosecution such as that of presumption. The effect of the application of s 34 is that once it is invoked in the charge itself and evidence was led to show that the appellants were involved in the crime, the appellants would be required to speak of their innocence or non-involvement in the crime or that at the material time of the crime they have disassociated from the crime. For s 34 to be made applicable for a charge of murder, it would be sufficient for the prosecution to show that two or more persons were involved without necessity of booking all the persons involved in the murder. It would sufficient if the common intention of committing the crime is attributed to more than one person and the crime is the result of joint act or executed at various stages by different persons to complete the offence (see paras 11–12).

[Bahasa Malaysia summary

Perayu-perayu, rakyat Myanmar, dituduh di bawah s 34 Kanun Keseksaan ('Kanun') kerana kesalahan membunuh. Pada hari malang tersebut, pergaduhan berlaku antara si mati dan perayu pertama. Ini membawa kepada serangan dan perayu kedua ikut serta dalam pergaduhan tersebut. Terdapat beberapa saksi kepada kejadian tersebut dan keterangan mereka mengesahkan bahawa si mati ditikam oleh perayu-perayu. Perayu-perayu kemudiannya dilihat melarikan diri dari tempat kejadian kerana si mati meninggal dunia. Pembunuhan tersebut dilakukan pada tahun 2003 dan perayu-perayu ditangkap dan didakwa pada tahun 2005 dan perbicaraan tamat pada tahun 2010. Keputusan diumumkan pada tahun 2010 tetapi alasan-alasan hanya diberikan selepas 21 bulan. Dalam rayuan-rayuan ini, isu utama yang berbangkit adalah sama ada ia selamat untuk menyabitkan atas aduan yang dibangkitkan oleh perayu-perayu. Perayu pertama berhujah bahawa kelewatan menyampaikan alasan penghakiman memprejudiskan dia dan selanjutnya berhujah bahawa s 34 Kanun berkaitan niat bersama tidak akan terdapat memandangkan pihak pendakwaan tidak menunjukkan hubungan antara

perayu-perayu dan pihak ketiga yang masih lagi bebas dan sememangnya telah bertindak bersama.

Diputuskan, menolak rayuan-rayuan:

(1) Kelewatan dalam prosiding jenayah termasuk pendengaran, keputusan begitu juga alasan-alasan penghakiman kadang-kadang adalah serius. Kesemuanya bergantung ke atas fakta dan keadaan kes untuk memberikan hak kepada perayu untuk mendapatkan sabitannya dibatalkan dalam bergantung ke atas perkara-perkara 5 dan 8 Perlembagaan Persekutuan. Tidak terdapat pertikaian bahawa keputusan diberikan secara segera, walaupun terdapat kelewatan dalam memberikan alasan-alasan tersebut. Walaupun hakim secara perlembagaan bertanggungjawab untuk memberikan alasan-alasan beliau tanpa kelewatan dan ia bukan tindakan yang boleh dikecualikan oleh mana-mana persatuan awam tetapi atas fakta kes, adalah jelas kes pembunuhan kejam dilakukan di tempat awam dengan saksi-saksi yang mencukupi dan tidak memerlukan apa-apa bentuk campur tangan mahkamah rayuan atas isu ini kerana hakim telah menulis penghakiman konsisten dengan nota-nota prosiding (lihat perenggan 9).

(2) Untuk membangkitkan s 34 Kanun, ia tidak akan menjadi *sine qua non* untuk pihak pendakwaan membuktikan pra-bersama atau pra-perancangan dalam erti kata sebenar. Adalah mencukupi jika pihak pendakwaan dapat membuktikan bahawa perayu-perayu berada di tempat tersebut dan mengambil bahagian dalam jenayah dan/atau mempunyai hubungan kepada jenayah tersebut. Seksyen 34 adalah bukan undang-undang substantif tetapi bersifat prosedur, memihak pihak pendakwaan seperti anggapan. Kesan permohonan s 34 adalah bahawa apabila saja ia dibangkitkan dalam tuduhan itu sendiri dan keterangan menunjukkan bahawa perayu-perayu perlu membuktikan ketakbersalahan mereka atau tidak terlibat dalam jenayah tersebut atau bahawa pada masa material jenayah tersebut mereka tiada kaitan dengan jenayah tersebut. Untuk s 34 diguna pakai bagi tuduhan membunuh, adalah mencukupi untuk pihak pendakwaan menunjukkan bahawa dua atau lebih orang terlibat tanpa perlu menuduh kesemua orang yang terlibat dalam pembunuhan tersebut. Adalah mencukupi jika niat bersama melakukan jenayah 'attributed' kepada lebih daripada satu orang dan jenayah adalah akibat tindakan bersama atau dilaksanakan di pelbagai peringkat oleh orang-orang berlainan untuk melengkapkan jenayah tersebut (lihat perenggan 11–12).]

Notes

For a case on delay in preparing and providing grounds of judgment, see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue) para 429.

For a case on murder, see 4(2) *Mallal's Digest* (4th Ed, 2012 Reissue) para 1682.

Cases referred to

Azman bin Jamhuri v PP [2000] MLJU 702, HC (refd)
Khairuddin bin Mohd Yusuf v PP [2005] MLJU 662, CA (refd)
Lee Kwai Heong & Anor v PP [2006] 2 MLJ 528, CA (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169, SC (refd)
PP v Thenegaran a/l Murugan [2013] 3 MLJ 328, CA (refd)
Phrueksa Taemchim (Thailand) v PP [2013] 6 MLJ 808; [2013] 5 AMR 338, CA (refd)
Pramod Mandal v State of Bihar (2004) 4 LR 124, SC (refd)
Ravindran a/l Ramasamy v PP [2013] 4 MLJ 665; [2013] 4 AMR 502, CA (refd)
TN Nathan v PP [1978] 1 MLJ 134 (refd)
Voon Chin Fatt v PP [1948–49] MLJ Supp 133 (refd)
Zabar Singh v The State of Uttar Pradesh AIR 1957 SC 465, SC (refd)

Legislation referred to

Criminal Procedure Code s 182A
Federal Constitution arts 5, 8
Penal Code ss 34, 299, 300

Appeal from: Suit No 45–125 of 2005 (High Court, Shah Alam)

S Ravichandran (Seah Balan Ravi & Co) for the first appellant.
Lee Teong Hooi (Chin Yiam & Associates) for the second appellant.
Tengku Amir Zaki bin Tengku Abdul Rahman (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Hamid Sultan JCA (delivering judgment of the court):

[1] Both the appellants' (Myanmar National) appeal came up for hearing on 15 July 2013 and on the same day we heard the appeals and dismissed it. My learned brother Azahar Mohamed JCA and my learned sister Rohana Yusuf JCA have read the draft judgment and approved the same. This is our judgment.

[2] The appellants were charged for murder read with s 34 of the Penal Code and the charge reads as follows:

> Bahawa kamu bersama-sama seorang lagi yang masih bebas pada 15 Oktober 2003 jam lebih kurang 6.30 petang bertempat di Bengkel Teksi Uptownace, No 9, Jalan Cempaka, Ampang di dalam Daerah Hulu Langat dalam Negeri Selangor di dalam mencapai niat bersama kamu telah melakukan bunuh dengan menyebabkan kematian seorang lelaki bernama KYAW SOE LIN (ALI BIN JALIL passport No

193613) dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan dan dibaca bersama seksyen 34 Kanun Keseksaan.

[3] It is pertinent to note in this case there were a number of eye witnesses to the incident and the issue of nexus between the deceased, the accused for the cause of the murder has been well laid out by the prosecution. Essentially, the case is one of finding of facts. The learned trial judge had in her 43 pages judgment meticulously documented the facts of the case and considered the defence of the appellants to satisfy s 182A of the Criminal Procedure Code ('CPC') as well as *Radhi*'s direction. The real issue in this case is related to whether it is safe to convict on the complaint raised by the appellants.

[4] Both the appellants have filed the petition of appeal. The first appellant's petition of appeal, inter alia, reads as follows:

(a) The learned judge erred in law and/or in fact when her ladyship wrongly decided to call the appellant to enter his defence even though the prosecution had failed to establish a prima facie case.

(b) The learned trial judge erred in law and/or in fact in holding that the prosecution had proved the case beyond reasonable doubt to the charge preferred against the appellant.

(c) The learned trial judge erred in law and/or in fact when her ladyship failed to take into consideration that evidences of the prosecution's witnesses were contradicting each other and full of material discrepancies especially the evidence of by SP1, SP2, SP3 and SP4 as follows:

(i) No direct evidence to confirm that the appellant stabbed the deceased;

(ii) No direct evidence to confirm which part of the deceased's body that the appellant had stabbed;

(iii) Their evidence is inconsistent with the expert evidence of the pathologist (SP10) wherein the pathologist stated that the three stab wounds were caused by one person with a same knife; and

(iv) Evidence led was inconsistent and contradicts with the identification parade reports.

(d) The learned trial judge erred in law and/or in fact when her ladyship failed to hold that the evidence of SP1, SP2, SP3 and SP4 were not credible as their evidence had material discrepancies and gaps.

(e) The learned trial judge erred in law/or in fact when her ladyship failed take into consideration the expert evidence of the pathologist (SP10) in that the three stab wounds were inflicted by one person with a same knife.

(f) The learned trial judge erred in law and/or in fact when her ladyship held

A that s 34 of the Penal Code applies to the facts of the case even though the appellant did not know the second appellant during the incident on 15 October 2003.

(g) The learned trial judge erred in law and/or in fact when her ladyship failed to hold that the investigation conducted by the police was shoddy.

B

(h) The learned trial judge erred in law and/or in fact when her ladyship failed to hold that the evidence of the appellant is credible and raised reasonable doubt in the prosecution's case.

(i) The learned trial judge in her decision failed to give due consideration or weight to the appellant's defence and thereby rejecting the evidence of the appellant. Her ladyship had failed to take into account the well established principle that however weak a defence may be, trial judge of both facts and law should not just brush aside the defence on the basis that the prosecution witnesses are to be believed and not the defence without giving reasons for the rejection of the defence.

C

D

(j) The learned trial judge erred in law/or in fact because the grounds in the notes of evidence does not amount to a reasoned judgment, as such her ladyship failed to do proper and comprehensive evaluation of the evidence before coming to the decision.

E

(k) The learned trial judge failed to apply the trite principles of law, that when evidence adduced during trial leads to more than one inference, then the court should have given the benefit of the doubt to the appellant and must refrain from filling up the gaps in the prosecution's case.

(l) The learned trial judge erred in her decision by convicting the appellant against the weight of the whole evidence. Her ladyship did not view the whole of the evidence objectively and from all angles, as such the appellant had lost the chance which was open to him of being acquitted.

F

(m) The learned trial judge took about twenty (20) months to write the grounds. The evidence, facts and demeanour of witnesses would not have been fresh in her mind when she wrote the grounds. Thus, the appellant is prejudiced and this has caused miscarriage of justice.

G

As such, the appellant appeals to set aside the conviction and sentence.

H **[5]** We have read the second appellant's petition of appeal in extensor and we do not think it is necessary to set it out, as it is wholly or partly a repetition in different words.

BRIEF FACTS

I

[6] There were a number of eye witnesses to the incident and the evidence of SP1 to SP4 confirmed the incident. On the fatal day there was a quarrel between the deceased and the first appellant which led to assault and subsequently the second appellant joined in the fray and the eye witnesses

confirmed that the deceased was stabbed by the appellants, and thereafter the appellants ran away. The deceased died of the incident.

The first appellant's submission

[7] The learned counsel for the first appellant in the written submission had argued in length that the grounds of judgment was only delivered nearly 21 months after the date of decision and in consequence the accused was prejudiced by the undue delay. And said that the learned judge would not have fairly and accurately assessed the case and the evidence of the witnesses. And relies on a number of cases to anchor the argument. We think it is necessary to deal with the issue of delay in this judgment.

[8] The cases relied on by the learned counsel are as follows:

(a) *Voon Chin Fatt v Public Prosecutor* [1948–49] MLJ Supp 133, where Spenser Wilkinson J had this to say:

> The interval between notice of appeal and delivery of grounds of decision should, in such a case be a matter of days, not weeks, much less months… The sooner, after hearing the witnesses the grounds of decision are written the clearer in the mind of the magistrate who writes them will be all the details of the evidence, the demeanour of the witnesses and the general atmosphere of the case.

(b) *TN Nathan v Public Prosecutor* [1978] 1 MLJ 134 where Gunn Chit Tuan J (as he then was) stated:

> In the present case, I regret to note that a summary trial under the provisions of the Criminal Procedure Code had to take so long to complete and that the judgment was not signed until eleven months after conclusion of the trial. Moreover, the further delay of another two years before receiving the grounds of decision was most unsatisfactory and has prejudiced the appellant.

(c) *Azman bin Jamhuri v Public Prosecutor* [2000] MLJU 702, where Ian Chin J (as he then was) had this to say:

> Delay of this nature is also not tolerated in England. The 14 February 1998 issue of both *The Telegraph* and *The Times*, Internet edition, carried the report of a senior judge in England, Mr Justice Harman, being castigated for taking 20 months to deliver a judgment in a civil case.
>
> I find those statements appropriate for the present case. It is no less applicable though it is a civil case because delay is even more relevant in a criminal case as it involves the liberty of a subject. Criminal cases should take far lesser time than a civil case because it is unlikely to involve novel questions of law unlike civil cases. The English judge resigned thereafter. The English Court of Appeal had also previously censured judges for delay in delivering reserved

> judgment though the delay was only eight months (*Rolled Steel Ltd v British Steel Coorporation* [1986] Ch 246) and five months (*Bishopgate Investment Management Ltd v Maxwell* [1993] BBC 120) … *It must be remembered that Justice delayed is justice denied. Why should the Malaysian standard be so much lower than that of the British? In fact the Malaysian standard was more or less set when the Chief Judge in 1994 (following a directive of the Chief Justice) set the said time of six weeks. It was obviously ignored.*
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> (Emphasis added.)

[9] Delay in criminal proceeding inclusive of hearing, decision as well as writing the grounds of judgment at times may be fatal. It all depends on the facts and the circumstances of the case to entitle an appellant to get his conviction squashed in reliance of arts 5 and 8 of the Federal Constitution. Justice Gopal Sri Ram JCA (as he then was) in the case of *Khairuddin bin Mohd Yusuf v Public Prosecutor* [2005] MLJU 662 had discussed these issues in length and it needs no repetition save to say as follows:

(a) In the instant case the murder was committed in the year 2003 and the appellants were arrested and charged in 2005 and the trial concluded in 2010. The verdict was pronounced in 2010 but the grounds were only given after 21 months.

(b) There was no dispute that the verdict was given promptly, though there was delay in supplying the grounds.

(c) Though the learned judge is constitutionally obliged to give her grounds without delay and it is not an act which can be condoned by any civil society but on the facts of the case we take the view that it is a clear case of cold blooded murder committed at a public place with sufficient eye witnesses and does not need any form of appellate intervention on this issue as the learned judge has written a speaking judgment consistent with the notes of proceedings which we have carefully perused.

[10] The first appellant also vehemently argues that s 34 of the Penal Code in relation to common intention will not be in place as the prosecution has not shown the nexus between the appellants and the third person who is at large and indeed had acted in concert. Section 34 of the Penal Code states as follows:

> 34 When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

[11] It is now well established that to invoke s 34 it is not a *sine qua non* for the prosecution to prove pre-concert or pre-planning in the true sense, (see *Lee Kwai Heong & Anor v Public Prosecutor* [2006] 2 MLJ 528). It will be sufficient if the prosecution can establish that the appellants were in the place and took

part in the crime and/or had nexus to the crime. Section 34 is not a substantive law but it is procedural in nature favouring the prosecution such as that of presumption. The effect of the application of s 34 is that once it is invoked in the charge itself and evidence is led to show that the appellants were involved in the crime, the appellants will be required to speak of their innocence or non involvement in the crime or that at the material time of the crime they have disassociated from the crime. Nothing more, (see *Ravindran a/l Ramasamy v Public Prosecutor* [2013] 4 MLJ 665; [2013] 4 AMR 502; *Phrueksa Taemchim (Thailand) v Public Prosecutor* [2013] 6 MLJ 808; [2013] 5 AMR 338).

[12] For s 34 to be made applicable for a charge of murder, it is sufficient for the prosecution to show that two or more persons were involved without necessity of booking all the persons involved in the murder. It is sufficient if the common intention of committing the crime is attributed to more than one person and the crime is the result of joint act or executed at various stages by different persons to complete the offence. For example, in a kidnapping case where one person abducts the victim and another ask for ransom money though both persons may not have been at the same place. The threshold for the prosecution to satisfy is very low and has nothing to do with the specifics stated in s 34 (see *Zabar Singh v The State of Uttar Pradesh* AIR 1957 SC 465). Learned author's to Nandi, *Criminal Ready Referencer*, (3rd Ed) Vol 3 at p 116 on common intention relating to homicide has this to say:

> Common intention to kill may be inferred from the conduct of the assailants, the entire chain of circumstances and the sequence of events, keeping in mind that the common intention to kill may not be present to start with but may develop later, *Venkatchala v State* Cri A No 16 of 195 decided by the Supreme Court on 22 January 1958. To infer common intention the time and place of the murder, the weapon carried by the accused, their relationship inter se and their concerted action in the wake of the murder are all relevant, *Lalu v State* AIR 1974 SC 2118; 1974 Cr LJ 1393; (1975) 3 SCC 273; see also *BN Srikantiah v State* AIR 1958 SC 672; 1958 Cr LJ 1251; *Nitya Sen v State* (1978) 2 SCC 382; 1978 Cr LJ 481; *Gurdas Singh v State* AIR 1975 SC 1411; 1975 Cr LJ 1218; (1975) 4 SCC 490.
>
> It may, in many cases, be difficult to decide whether the criminal act has been done by several persons in furtherance of the common intention of all. But, once it is decided that the act is so done by a number of persons (more than one person) in furtherance of the common intention of all, the legal position that results is that each person shall be held to have committed the entire criminal act, *Matiullah v State* AIR 1965 SC 132; (1965) 1 Cr LJ 126.

[13] In addition we must say the learned counsel's argument that the prosecution ought to have shown motive for the murder has no merits on the facts of the case. Motive may be essential if it is a case where the prosecution is relying on circumstantial evidence. Unlike common law offence of murder, the statutory offence of murder or manslaughter based on ss 299 and 300 of the

Penal Code strictly does not require motive as an element to be proved. If at all evidence of motive is introduced by the prosecution where direct evidence is available for homicide then it is only meant to strengthen the probative force of the prosecution case and/or to negate the defence of self defence or provocation, etc at the earliest stage.

[14] The appellants' counsel's lengthy submission relating to the issue that the learned trial judge has failed to evaluate the evidence of SP1 to SP4 and other witnesses according to law has no merits. The issue raised is one of finding of facts. We have perused the lengthy judgment of the learned trial judge and meticulously contrasted with the notes of proceedings and our conclusion is that the view taken by the trial court was a reasonable view of the evidence on record, (see *Pramod Mandal v State of Bihar* (2004) 4 LR 124 (SC); *Public Prosecutor v Thenegaran a/l Murugan* [2013] 3 MLJ 328).

[15] It is well settled that it is in the hands of triers of facts to assess the quality of evidence and to determine whether the evidence on record justifies a conviction as well as sentence. We have perused the evidence in detail and we are satisfied that there are sufficient material to support the charge and the view taken by the trial court on the relevant issues in our view was a reasonable view of the evidence on record, and the court had followed Radhi's direction and rightly applied the maximum evaluation and beyond reasonable doubt test.

[16] We are of the considered view it is a safe decision and appellate intervention is not warranted and the appeal has no merit. Accordingly we dismiss the appeals.

We hereby order so.

Appeals dismissed.

Reported by Afiq Mohamad Noor